

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

SMYRNA READY MIX CONCRETE, LLC

and

GENERAL DRIVERS, WAREHOUSEMEN AND  
HELPERS, LOCAL UNION NO. 89, AFFILIATED  
WITH THE INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

Cases 09-CA-251578  
09-CA-252487  
09-CA-255573  
09-CA-258273

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**COUNSEL FOR THE CHARGING PARTY GENERAL DRIVERS,  
WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89,  
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF  
TEAMSTER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR  
EXTENSION OF TIME TO FILE RESPONDENT'S EXCEPTIONS**

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General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (hereinafter "Charging Party" or "Union"), submits this Response in Opposition to Respondent's Motion for Extension of Time to File Respondent's Exceptions.

On September 1, 2020, Judge Arthur Amchan issued a decision in the above-captioned case, finding that Respondent had violated the Act.<sup>1</sup> An Order was also issued, stating that "Exceptions to the Decision of the Administrative Law Judge . . . must be received by the Board's Office of the Executive Secretary . . . on or before **SEPTEMBER 29, 2020.**"<sup>2</sup>

On September 30, 2020, at around 1:40 a.m., Respondent electronically filed its Exceptions and brief in support. The Deputy Executive Secretary sent a letter later that morning

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<sup>1</sup> Decision, JD-33-20 (Sept. 1, 2020).

<sup>2</sup> Order Transferring Proceedings to the National Labor Relations Board (Sept. 1, 2020).

rejecting the filings as untimely and informing the parties that they would not be forwarded to the Board. On October 1, 2020, after receiving this letter, Respondent filed a Motion for Extension of Time to File Respondent's Exceptions and Brief in Support of Exceptions Due to Excusable Neglect. Respondent argues that the Board's website was "down" and the NLRB's E-filing system was "unable to handle this request."

According to the NLRB's Electronic Filing Terms & Conditions:

*"If the Agency's E-Filing system is unable to receive documents for a continuous period of more than 2 hours after 12 noon (Eastern Time), the Agency will declare the site to be in technical failure. **The Agency will post notice of the technical failure determination on the website as soon as possible. The Agency will also post notice regarding scheduled service, system maintenance or upgrades, or other events that will make the system unavailable to receive filings.** If a party is prevented from E-Filing a document on its due date because of an Agency-determined technical failure, the document must be filed by 5:00 p.m. (Eastern Time) on the next business day."* [emphasis added].

It does not appear that the Agency posted any of the notices described above on its website.

Furthermore, late filing due to user problems do not rise to excusable neglect. "The Board's e-filing terms warn potential filers not to wait until the last minute to file, and that a user's problems with hardware, software, or internet service providers, or problems understanding and following the e-filing instructions, will not excuse an untimely filing." *Ridgewood Health Care Center Inc. and United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union* 2015 WL 6429384 (NLRB). The Board presumes that if it is unclear "whether the problem is a technical failure or a user problem, [one should] assume it is a user problem." *Id.* (citing E-Filing Terms and Conditions). While e-filing gives

filers the option to file up through 11:59 p.m. of the due date, “a user who waits until after close of business on the due date to attempt to E-File does so at [their] own peril.” *Id.* at fn.1 (citing E-Filing Terms and Conditions). In this case, the evidence indicates that Respondent first attempted to file its Exceptions and supporting brief with little more than an hour left before the filing deadline.<sup>3</sup>

Respondent’s Motion should be denied and its Exceptions to the Administrative Law Judge’s Decision and supporting brief should be rejected.

Respectfully Submitted,

/s/ David O’Brien Suetholz

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<sup>3</sup> See Respondent’s Motion, Ex.C (showing first timestamp as 9:48 p.m. Central time, or 10:48 p.m. Eastern).

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically on October 2, 2020 with the NLRB and sent via e-mail to the following:

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Mary Leigh Pirtle  
Tim Garrett  
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